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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

J.L. LESTER & SON, INC.

APPELLANT

V.

CAROLYN TEESE SMITH

ADMINISTRATRIX, ESTATE OF H.W. SMITH

APPELLEE

PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF GEORGIA

AND TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether under State Statute authorizing Summary Judgment 30 days after motion filed and served, requirements of federal due process and equal protection are met where court hears and enters judgment for movant on count filed only two days prior to hearing and to which there has been no Motion filed and no notice or opportunity for hearing given.
2. Whether where a State statute authorizes court to enter Summary Judgment on motion where all issues of fact have been eliminated it meets federal due process and equal protection for court to grant summary judgment because plaintiff failed to prove his allegations.
3. Whether State statutes and decisions defining and distinguishing a guarantor and surety may be applied to same factual situations and opposite results reached without violating federal due process and equal protection.
4. Whether security deed given by grantor to cover future debts of third person can be ordered cancelled by court when debts have not been paid without violating federal due process rights.

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IN THE

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No.

J.L. LESTER & SON, INC.

Petitioner

V.

CAROLYN TEESE SMITH

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND TO THE COURT OF APPEALS OF GEORGIA

THE PETITIONER, J.L. LESTER & SON, INC. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia in this case of June 2, 1981 in which rehearing was denied on June 23, 1981 and the judgment of the Georgia Court of Appeals of May 3, 1982 in which rehearing was denied June 7, 1982 and in which the Supreme Court of Georgia denied the writ of certiorari on July 9th, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported in 162 Ga. App. 506 and

the report of decision by the Supreme Court of Georgia in a previous appearance of this case in that court is reported in 247 Ga 710. The decision of the trial court after the Supreme Court decision and before the Court of Appeals of Georgia decision is set out in the appendix hereto, as are the decisions of the Georgia Supreme Court and Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3rd, 1982, and a timely motion for rehearing in that court was denied on June 7, 1982, and the Supreme Court of Georgia denied petitioner's application for a writ of certiorari on July 9, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 27 U.S.C. Sect. 1257 (3).

QUESTIONS PRESENTED

1. Whether under a State Statute authorizing a trial court to enter Summary Judgment 30 days after motion therefor has been filed and served the requirements of federal due process and equal protection are met in a case where the

trial court hears and enters judgment for movant on a count which has been filed only two days prior to the hearing and to which count there has been no Motion for Summary Judgment filed and no notice or opportunity to prepare for the hearing has been given.

2. Whether in a case where a State statute authorizes the court to enter a Summary Judgment on motion where all issues of fact have been eliminated it meets the requirement of federal due process and equal protection for the court to grant a summary judgment because the plaintiff has failed to prove his allegations.

3. Whether State statutes and decisions defining and distinguishing a guarantor and a surety may be applied to the same factual situations and opposite results reached without violating federal due process and equal protection.

4. Whether a security deed given by the grantor clearly to cover future debts of a third person can be ordered cancelled by the court when these debts have not been paid?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

CONSTITUTION OF UNITED STATES

ARTICLE I, SECTION 10

LIMITATIONS OF POWERS OF INDIVIDUAL STATES

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts or grant any Title of Nobility.

Article V. Constitution of the United States

Article XIV. Constitution of the United States

81A-156 (b). Georgia Code Annotated

A party against whom a claim, counter claim or cross-claim is asserted...may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceeding thereon The motion shall be served at least 30 days before the time fixed for the hearing The adverse party prior to the day of hear ing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined.

(f) When affidavits are unavailable Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition,

the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

67-1301, Georgia Code Annotated

Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said grantor any money or to secure any other debt....such conveyance of real or personal property shall pass the title of said property to the grantee until the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts to be an absolute conveyance...and not a mortgage.

103-101, Georgia Code Annotated

Suretyship-Definition; guaranty distinguished.--The contract of suretyship is one whereby a person obligates himself to pay the debt of another in consideration of credit or indulgence, or other benefit given to his principal, the principal remaining bound therefor. It differs from a guaranty in this, that the consideration of the latter is a benefit flowing to the guarantor.

113-1525, Georgia Code Annotated

Duty (of Administrator) as to contracts of decedent. The administrator, as far as possible,.shall fulfill the exec-

utory and comply with the executed contracts of the decedent.....If, however the personal skill of the intestate entered into the consideration of the contract, his death renders the execution impossible, and the contract, though entire, shall be considered as divisible and closed at his death...

STATEMENT OF THE CASE

Petitioner and respondent's intestate entered into an executory contract whereby petitioner agreed to furnish merchandise to H.W. Smith and to a corporation which was in the process of being formed by Mr. Smith and his associates. The contract anticipated that the merchandise would be paid for on delivery, but recognized that for various reasons debts would be incurred in the ongoing relationship, and a security interest in the assets of the businesses was given to secure such debts.

The contract provided that " The persons signing this agreement for retailer shall be personally and individually bound to pay and liable for all indebtedness that may result on the part of retailer to wholesaler whether retailer is a partnership, corporation or proprietorship in addition to the liability of the retailer who may be operating as a corporation or partnership. The liability of the undersigned

signatories shall be primary, original, joint and several, and suit may be brought for collection of such indebtedness against any one or more of the parties liable."

The contract further provided that it was binding on " the representatives, succ essors and assigns of each of the parties thereto"

In connection with the transaction, Smith made and delivered to petitioner a deed to secure debt conveying 397.37 acres of land to secure payment of 3 certain notes described therein and also it included the following recitation "...and this deed will secure all indebtedness of Smith & Whitfield & also indebtedness of Bubba's of Tenn., Inc., a corporation now being formed."

The corporation's organization was completed and petitioner furnished merchandise to it which was not paid for.

H.W. Smith was murdered in July, 1979, at which time Bubba's of Tenn. Inc was indebted to petitioner on open account for merchandise delivered under the contract with Smith in an amount over $85,000.00.

Petitioner's officers learned of Smith's death, but were not directed to cease delivering merchandise to Bubba's by his administratrix, the respondent, and continued

to deliver merchandise to the corporation, of which Smith's administratrix became an officer and director.

Bubba's of Tenn., Inc. in the ensuing months, made payments to petitioner but the amount owing at the time of Smith's death by Bubba's never subsequently was reduced by these payments, but continued to increase.

Petitioner then began procedures to foreclose the security deed against the sums owed by Bubba's by exercise of the power of sale contained in the deed.

Respondent then filed an equitable complaint to enjoin the sale and after hearing, the trial court entered a temporary injunction preventing the foreclosure of the security deed by petitioner to collect any sums claimed due under the contract between petitioner and Smith to furnish merchandise to Bubba's as a result of any merchandise delivered to Bubba's after Smith's death; basing the action on its findings that (1) Smith signed the contract in his corporate capacity and thus was never liable individually (2) The contract was one of guaranty, and thus revoked by Smith's death, and (3) There was no indebtedness existing at the time of Smith's death.

Petitioner appealed the issuance of the temporary injunction to the Georgia Sup-

reme Court, which initially affirmed the trial court's judgment without opinion.

Petitioner filed its motion for rehearing in the Georgia Supreme Court and that court entered its decision in which it held:

1- The contract between petitioner & Smith fixed the terms and conditions upon which purchases were to be made by the wholesaler to the retailer. It was an offer for formation of a number of contracts from time to time, citing Buick Motor Co. v. Thompson, 138 Ga 282

2- Smith cannot be liable for those contracts made after his death pursuant to the standing offer made in the contract because "to constitute a valid contract, there must be parties able to contract" and whether Smith was offeror or offeree, An offeree's power of acceptance is terminated when the offeree or offeror dies"

3- While Smith's estate would have been liable for payment upon any contracts entered into prior to his death, his estate is not liable for payment upon contracts made pursuant to the contracts after his death

4- The trial court court did not err in enjoining the foreclosure sale to satisfy open account indebtedness incurred subsequently to Smith's death.

As a result of petitioner's second motion for rehearing, the Supreme Court held: "On motion for rehearing, the wholesaler contends that this latter finding of the trial court (that there existed no outstanding open account indebtedness on the date of Smith's death) was erroneous. This issue is one which can only be resolved at a trial on the merits and the trial court did not abuse its discretion in granting the interlocutory injunction in order to preserve the status quo until that issue could be decided upon the final trial of the case, citing:

Parker vs. Amer Family etc 229 Ga 633

which held that where an issue of fact was involved it is one "which can only be resolved by a jury" and the trial court was authorized to grant an interlocutory injunction in order to preserve the status quo.

Respondent had filed a motion for summary judgment in the trial court while the case was pending in the Supreme Court, & filed an amendment to the motion on the 11th day of June, 1981, 18 days before the remittitur was filed in the trial court.

On July 6, 1981, respondent filed a "Notice of Motion" signed only by counsel for movant which showed service by mail on July 1, 1981 and which was received by

petitioner's counsel on July 9th. It was not filed in court until July 6, 1981.

On June 30, 1981, petitioner filed an amendment to his counterclaim against respondent in which additional counts adding a cause of action for fraud and misrepresentation were set outand new factual allegations added to the defenses.

The "Notice of Motion" received by petitioner's counsel on July 9th stated that respondent would call the motion for summary judgment up before the court on July 15th for hearing and no order of court was included that petitioner appear.

On July 14th, petitioner filed his verified RESPONSE to the Motion for Summary Judgment, claiming improper and inadequate notice and service of the hearing, and claiming that he was entitled to 30 days notice of the hearing. In the affidavit filed with the RESPONSE petitioner also showed that it was entitled to service of an order or rule of court setting the hearing rather than a Notice of Motion signed by counsel for movant, and that there were matters of evidentiary defense to the Motion that could not be presented by affidavit and could not be presented within the time afforded by respondent's Notice of Motion.

The court, on July 15th, overruled the

petitioner's RESPONSE, and denied additional time for petitioner to prepare for the hearing, heard the motion, and entered an order sustaining the motion for summary judgment on October 7, 1981.

At no time did respondent file a Motion for Summary Judgment as to the fraud count of the counterclaim, and no additional affidavits or other evidence in support of the Motion for Summary Judgment was filed from the time of the Supreme Court judgment until the judgment of the trial court on October 7, 1981.

In spite of the absence of a motion for summary judgment as to the fraud count the trial court granted summary judgment as to that count, as well as the original count sounding in contract.

In spite of the absence of any evidence by affidavit or otherwise relating to the issue of fraud, the trial court sustained the motion for summary judgment on the basis that " the depositions and evidence fail to support allegations of fraud in the amended Counterclaim and any such cause of action is hereby dismissed", and " There is no evidence of a contrary intention in this case (but that Smith signed the operating agreements as a guarantor)."

The decisional law of Georgia as to the power of the court to grant summary judg-

ments at the time was settled and clear as set out in the case of:

Lansky v. Goldstein, 136 Ga App 607

" On a motion for summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party and all doubts are resolved against the movant. The movant has that burden even as to issues upon which the opposing party would have the trial burden and the moving party's papers are carefully scrutinized, while the opposing party's papers, if any, are treated with considerable indulgence."

In granting summary judgment in favor of respondent, the trial court by supplemental order decreed that upon payment of the amounts due as attorney's fees on the note indebtedness of H.W. Smith and Bubba's of Tenn.Inc., the security deed given by H.W. Smith to secure all debts of Bubba's must be cancelled and surrendered by petitioner.

Since the statutory and decisional law of Georgia relating to the distinction between suretys and guarantors was apparently clear and settled as to a surety's obligations surviving his death while a guarantor's did not and that Smith's contract with petitioner clearly made him a surety; and since the security deed statutes and decisions relating thereto clearly provid-

ed that such deeds may be accepted as security for future debts of a third person, and foreclosed for payment of such debts; petitioner did not anticipate that the Georgia Supreme Court would violate the petitioner's federal due process and equal protection rights by applying a different and individual set of legal principles to him; and thus did not raise the issue of such violations until they had occurred in the Georgia Supreme Court, but did raise these issues of violation of his federal constitutional rights in its motion for rehearing in the Supreme Court.

In withdrawing its original decision & opinion and in altering its second decision and opinion, the Georgia Supreme Court necessarily considered and decided against petitioner's contentions of violations of his federal constitutional rights.

After remand to the trial court and before the decision of the Georgia Court of Appeals affirming the grant of respondent's motion for summary judgment against petitioner, the statutes and decisions of Georgia relating to the consideration and grant of summary judgments in the absence of a motion therefor and without reasonable notice and opportunity to prepare for a hearing clearly required a judgment reversing the entry of summary judgment against pet-

itioner; and petitioner did not anticipate that the Court of Appeals would apply a set of different principles of law to the same set of controlling facts in petitioner's case and affirm a clearly erroneous eous decision; and thus did not raise an issue of violation of its federal constitutional rights to due process, equal protection and no retroactive impairment of the obligation of contracts until it did so in its petition for certiorari to the Georgia Supreme Court in this case.

In denying the petition for certiorari, the Georgia Supreme Court necessarily considered and denied petitioner's contentions that his federal constitutional right was violated.

REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of Georgia of June 3, 1981, is clearly in violation of petitioner's right to due process of law and equal protectinn of the laws of Georgia in that it was inconsistent with that state statute defining contracts of surety and guaranty which controls other contracts and categorized the surety contract in this case as one of guaranty. The contract here involved is one in which respondent's decedent obligated himself to pay the debt of a corpor-

ation he was in the process of forming in consideration of credit given to the corporation, and there was no consideration or benefit flowing to Smith thereunder.

The Supreme Court of Georgia held in the case of: Allen v. Confederate Publishing Co., 121 Ga 773, that under a contract made during the lifetime of Allen which provided that Allen would pay for books to be published and delivered to Allen in accordance with the terms of the contract as follows: " Even if the contract is treated as unilateral, it was binding upon J.H. Allen during his lifetime, and his legal representatives after his death, until there was a withdrawal communicated to the other party before its promise was executed in whole or in part."

The court went on to say in that decision: " Allen did not attempt to withdraw during his lifetime, and his executor made no effort to withdraw until after the books were published and offered to him in compliance with the undertaking of the plaintiff. The death of J.H. Allen did not terminate the contract. A mere notice to the plaintiff that Allen had died would not amount to a withdrawal on the part of the executor, even if he was at liberty to with draw at the time this notice was given."

The Supreme Court, in its opinion, based it on the case of Buick Motor Co. v. Thompson, 138 Ga 282, but even that case was authority for reversal of the trial court rather than affirmance since it held, @ 286 " An offer to sell on certain terms without consideration therefor, is unilateral, and may be withdrawn before acceptance. After acceptance while still open and an agreement to buy, it ceases to be unilateral and becomes bilateral and binding..If the offer is...generally to furnish upon order, then the giving of an order for a certain thing or amount included in the offer, before its withdrawal or termination makes a definite and fixed tract as to the thing or things so ordered."

The Supreme Court decision was also in violation of the state statute which controls others who have contracted with persons who die thereafter, and which says, " Duty (of administrator) as to contract of decedent.-- The administrator, as far as possible, shall fulfill the executory and comply with the executed contracts of the decedent...." See 113 Ga Code Ann 1525.

In addition, even in contracts of guaranty in Georgia, under the authority cited by the trial court, the death of the guarantor does not nullify the obligation of the contract as to transactions after the

death of the guarantor if the contract of guaranty itself expresses a contrary intention. See Sulter v. Citizens Bank & Trust Co., 51 Ga App 798. And also see fact that contract involved her specifically bound Smith's administrators.

In holding Smith's administratrix was not liable to petitioner for goods furnished his corporation after his death and before petitioner was notified the offer was withdrawn, the Georgia courts clearly violated petitioner's rights to due process of law and equal protection of the laws and this justifies the grant of the writ of certiorari by this Court.

2. The decision of the Georgia Supreme Court holding that the security deed given by Smith in his lifetime to secure payment of his corporation's debts could not be foreclosed to collect for goods furnished the corporation after Smith's death impaired the obligation of the petitioner's contract with Smith retroactively, and was contrary to Article I, Section 10 of the United States Constitution.

The applicable state statute, Ga. Code Ann. 67-1301, provides that a security deed passes title to the property to the grantee until the debt or debts which said conveyance was made to secure

have been fully paid.

In the security deed involved here, it recited that it was given to secure certain specified notes and all other obligations of H.W. Smith and Bubba's of Tenn., Inc. " a corporation now being formed", which clearled referred to future debts of said corporation because it was not even in existence when the deed was given.

A case in the federal court system first spelled out that a deed to secure debt in Georgia may be given to secure the debt of a third person. See In Re American Ventures, Inc., 340 Fed Supp 279. In addition, the Georgia appellate courts had clearly held a security deed can be made and enforced to secure payment for certain goods and supplies to be furnished by the plaintiff to the defendants in the future. See Barnes v. Downing Company, 154 Ga. 363.

Therefore, in holding that the security deed sought to be foreclosed by petitioner did not cover the debt of Bubba's Inc of Tenn. for goods furnished by petitioner after Smith's death, the Georgia Supreme Court clearly violated petitioner's right to equal protection of the state's laws as applied to others, and such holding impaired retroactively the obligation of Smith's contract with petit-

ioner. This ruling, we submit, justifies the issuance of the writ of certiorari to review the judgment below.

3. Petitioner was denied due proc- procedurally in the state court's actions in granting summary judgment as to a count in the absence of a motion for summary judgment. This is clearly error under the federal interpretation of procedure, see- New & Used Auto Sales v. Hansen 245 Fed 2d 951, which has been approved by the Georgia appellate courts in Cruce v. Randall, 245 Ga 669, except in cases where such filing would be a pure formality and the Georgia court has cited with approval 6 Moore's Federal Practice, 56-331, 334, and 56.12 " Care should, of course, be taken by the trial court to determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried, and that the party for whom summary judgment is rendered is entitled thereto as a matter of law."

In the case before the court, the Court of Appeals of Georgia sustained a grant of summary judgment in this case in the absence of the notice provided by law and where petitioner had complied with the provisions of law to secure additional time

and where no motion for summary judgment as to that count had been filed, and in which the trial court did not find that there was no genuine issue of fact, but found instead that petitioner had not come forward with evidence to prove the allegations of fraud set out in his complaint to which there did not even exist a denial in the pleadings of movant.

4. Petitioner's treatment in this case at the hands of the state court system from the trial level to the Supreme Court of Georgia is so basically unfair and inconsistent with law and petitioner's federal constitutional rights; and the decisions sought to be reviewed have injected so many conflicting principles into the law of Georgia that unless reviewed and corrected, many other citizens of the United States living in Georgia will be equally deprived of their federal constitutional rights.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Georgia Court of Appeals and the prior judgment of the Georgia Supreme Court as set out in this petition.

Respectfully submitted,

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September 30, 1982.